



Neutral Citation Number: [2023] EWHC 2918 (Admin)

Case No: CO/996/2023

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 November 2023

Before :

MRS JUSTICE LIEVEN

Between :

**THE KING (on the application of
PICKERING FISHERY ASSOCIATION by MARTIN SMITH)**

Claimant

and

**SECRETARY OF STATE FOR
ENVIRONMENT, FOOD AND RURAL AFFAIRS**

Defendant

and

ENVIRONMENT AGENCY

Interested Party

Dr David Wolfe KC and Mr Raj Desai (instructed by Fish Legal) for the Claimant
Ms Nina Pindham (instructed by Government Legal Department) for the Defendant
Mr Matthew Fraser (instructed by Environment Agency) for the Interested Party

Hearing dates: **12 and 13 July 2023**

APPROVED JUDGMENT

Mrs Justice Lieven DBE :

1. This is a challenge to the decision of the Defendant, the Secretary of State (“SoS”), on 14 December 2022 to approve the updated Humber River Basin Management Plan (“HRBMP”) under regulation 31(1) of the Water Environment (Water Framework Directive) England and Wales Regulations 2017 (“the Regulations”).
2. The Claimant is the Pickering Fishery Association, an unincorporated association established in 1892, acting through its Club Secretary (Martin Smith). The Claimant owns leasehold and freehold fishing rights for most of the Upper Costa Beck (“UCB”), a surface water body in the Ryedale district of North Yorkshire.
3. The SoS is the “*appropriate authority*” for river basin districts in England under the Regulations. These transpose the Water Framework Directive 2000 (“WFD”) into domestic law (with minor necessary amendments as retained EU Law).
4. The Interested Party, the Environment Agency (“the EA”), is the “*appropriate agency*” for river basin districts in England and has various water management responsibilities under the Regulations.
5. The representation was Dr David Wolfe KC and Raj Desai for the Claimant, Nina Pindham for the Defendant and Matthew Fraser for the Interested Party.
6. There is considerable overlap and interaction between the Grounds. In essence they are:
 - a. Ground One - error of law in respect of regulation 12(6) of the Regulations, namely the duty to carry out periodic review of the “Programme of Measures”;
 - b. Ground Two is not proceeded with as a separate Ground.

- c. Ground Three - the SoS's approval of the HRBMP was wrong in law because the document submitted did not comply with regulation 3 and regulation 12;
 - d. Ground Four - breach of regulation 16(7) by failing to carry out a lawful review of the implementation of the measures set out in regulation 16(6)(b);
 - e. Ground Five – failure to carry out a lawful consultation.
7. Permission was granted on all Grounds by Mrs Justice Lang.
8. At the heart of all the Grounds lies the issue of whether, and to what degree, the HRBMP or any other documents produced by the EA pursuant to the Regulations must set out information at the level of the individual water body as opposed to at river basin district level, or even national level. The information in question is what measures are going to be taken to achieve the environmental objectives referred to in the WFD and the Regulations.
9. A significant complication in the case is that although the decision under challenge is the SoS's approval of the HRBMP, the real thrust of the case, as I understand it, is that there is an obligation on the SoS to set out the measures that are to be taken to meet the objectives in respect of the individual water body (here the UCB); to review those measures; and to consult upon them. It is these specific water body measures which the Claimant submits have not been lawfully set out, consulted upon and approved by the SoS.

The Water Framework Directive (WFD) and the Regulations

10. The scheme of the Regulations is a complex one, not least because it relates back to the WFD itself. I will therefore start with the Directive and then set out the relevant

provisions of the Regulations. Regulation 3 makes the obligations under the WFD directly applicable and therefore it is necessary to read the two documents closely together.

WFD

11. Article 1 sets out the purpose of the WFD, and states:

“Article 1 Purpose

The purpose of this Directive is to establish a framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater which:

...

(c) aims at enhanced protection and improvement of the aquatic environment, inter alia, through specific measures for the progressive reduction of discharges, emissions and losses of priority substances and the cessation or phasing-out of discharges, emissions and losses of the priority hazardous substances;

...”

12. Article 2(10) defines a “body of surface water” (in the Regulations “a water body”) as:

“... ‘Body of surface water’ means a discrete and significant element of surface water such as a lake, a reservoir, a stream, river or canal, part of a stream, river or canal, a transitional water or stretch of coastal water.”

13. Article 2(13) defines a “river basin” as the area of land from which all surface run-off flows through a sequence of streams, rivers and possibly lakes into the sea at a single river mouth, estuary or delta.
14. Article 2(15) of the WFD defines “river basin district” as the area of land and sea made up of one or more “neighbouring river basins together with their associated

ground waters and coastal waters". The WFD Regulations define these as "...the main unit for the management of river basins..."

15. Article 3(4) provides "*Member States shall ensure that the requirements of this Directive for the achievement of the environmental objectives established under Article 4, and in particular all Programmes of Measures are coordinated for the whole of the river basin district*".
16. Article 4 sets out the environmental objectives for surface water:

"Article 4 Environmental Objectives

1. In making operational the programme of measures specified in the river basin management plans:

(a) for surface waters

(i) Member States shall implement the necessary measures to prevent deterioration of the status of all bodies of surface water, subject to the application of paragraphs 6 and 7 and without prejudice to paragraph 8;

(ii) ...

(iii) Member States shall protect and enhance all artificial and heavily modified bodies of water, with the aim of achieving good ecological potential and good surface water chemical status at the latest 15 years from the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the applications of paragraphs 5, 6 and 7 without prejudice to paragraph 8; [emphasis added]

..."

17. Article 4(4) allows the time limits in Article 4(1) to be extended in certain circumstances and to certain limits:

“The time limits laid down in paragraph 1 may be extended for the purposes of phased achievement of the objectives for bodies of water, provided that no further deterioration occurs in the status of the affected body of water when all the following conditions are met:

(a) Member States determine that all necessary improvements in the status of bodies of water cannot reasonably be achieved within the timescales set out in that paragraph for at least one of the following reasons:

(i) the scale of improvements required can only be achieved in phases exceeding the timescale, for reasons of technical feasibility;

(ii) completing the improvements within the timescale would be disproportionately expensive;

(iii) natural conditions do not allow timely improvement in the status of the body of water.

(b) Extension of the deadline, and the reasons for it, are specifically set out and explained in the river basin management plan required under Article 13.

(c) Extensions shall be limited to a maximum of two further updates of the river basin management plan except in cases where the natural conditions are such that the objectives cannot be achieved within this period.

(d) A summary of the measures required under Article 11 which are envisaged as necessary to bring the bodies of water progressively to the required status by the extended deadline, the reasons for any significant delay in making these measures operational, and the expected timetable for their implementation are set out in the river basin management plan. A review of the implementation of these measures and a summary of any additional measures and a summary of any additional measures shall be included in updates of the river basin management plan.”

18. The UCB is a heavily modified water body (“HMWB”), because of the human impact upon it, and therefore Article 4(1)(a)(iii) applies.

19. Article 5 requires each Member State to ensure that there is an analysis of the characteristics of the river basin, according to the technical specifications in Annex II.

Paragraph 1.5 of Annex II states:

“1.5 Assessment of Impact

Member States shall carry out an assessment of the susceptibility of the surface water status of bodies to the pressures identified above.

Member States shall use the information collected above, and any other relevant information including existing environmental monitoring data, to carry out an assessment of the likelihood that surface water bodies within the river basin district will fail to meet the environmental quality objectives set for the bodies under Article 4. Member States may utilise modelling techniques to assist in such an assessment.

For those bodies identified as being at risk of failing the environmental quality objectives, further characterisation shall, where relevant, be carried out to optimise the design of both the monitoring programmes required under Article 8, and the programmes of measures required under Article 11.” [emphasis added]

20. Article 11 sets out matters at the heart of the dispute in this case. It is headed

“Programme of Measures”.

21. Article 11(1) requires that each Member State:

“...shall ensure the establishment for each river basin district, or for the part of an international river basin district within its territory, of a programme of measures, taking account of the results of the analyses required under Article 5, in order to achieve the objectives established under Article 4. Such programmes of measures may make reference to measures following from legislation adopted at national level and covering the whole of the territory of a Member State. Where appropriate, a Member State may adopt measures applicable to all river basin districts and/or the portions of international river basin districts falling within its territory.” [emphasis added]

22. Article 11(3) sets out a list of “*basic measures*” which are the minimum requirements to be complied with and Article 11(2) allows supplementary measures where necessary.

23. Article 11(5) provides:

“Where monitoring or other data indicate that the objectives set under Article 4 for the body of water are unlikely to be achieved, the Member State shall ensure that:

- the causes of the possible failure are investigated,*
- relevant permits and authorisations are examined and reviewed as appropriate,*
- the monitoring programmes are reviewed and adjusted as appropriate, and*
- additional measures as may be necessary in order to achieve those objectives are established, including, as appropriate, the establishment of stricter environmental quality standards following the procedures laid down in Annex V.”*

24. Article 11(8) states:

“The programmes of measures shall be reviewed, and if necessary updated at the latest 15 years after the date of entry into force of this Directive and every six years thereafter. Any new or revised measures established under an updated programme shall be made operational within three years of their establishment.”

25. Article 13 requires the Member State to produce a river basin management plan for each district and that it contains the information in Annex VII. That Annex includes the following elements:

“RIVER BASIN MANAGEMENT PLANS

...

2. a summary of significant pressures and impact of human activity on the status of surface water and groundwater, including:

...

5. a list of the environmental objectives established under Article 4 for surface waters, groundwaters and protected areas, including in particular identification of instances where use has been made of Article 4(4), (5), (6) and (7), and the associated information required under the Article;

...

7. a summary of the programme or programmes of measures adopted under Article 11, including the ways in which the objectives established under Article 4 are thereby to be achieved; [emphasis added]

...”

26. Article 14 contains a public information and consultation requirement, including that:

“1(c) draft copies of the river basin management plan, at least one year before the beginning of the period to which the plan refers.

On request, access shall be given to background documents and information used for the development of the draft river basin management plan.”

27. Drawing these provisions together, the purpose of the “*Programme of Measures*” is to “*achieve the objectives established under [Article 4 WFD]*”, see Article 11(1). Article 4(1) provides that in making operational the Programme of Measures member states for HMWBs shall aim to achieve good ecological potential. Therefore the Programme of Measures is expressly linked to meeting the objectives in Article 4, which are themselves aiming for good ecological status.

The Regulations

28. The WFD Regulations define the parties’ responsibilities as follows (by reg. 2): The EA is the “*appropriate agency*” in relation to “*a river basin district that is wholly in England*”, and the SoS is the “*appropriate authority*”, again in relation to “*a river*

basin district that is wholly in England". The Programme of Measures is defined as
"in relation to a river basin district, means the Programme of Measures established
under regulation 12 in accordance with regulation 20".

29. Reg 3(1):

"Duties on ministers and regulators

3(1) The Secretary of State, the Welsh Ministers, the Agency and NRW must exercise their relevant functions so as to secure compliance with the requirements of the WFD, the EQSD and the GWD."

30. Reg 12(1), (2) and (6):

"Procedure for setting environmental objectives and programmes of measures

12(1) The appropriate agency must, by such date as the appropriate authority may direct, prepare and submit to the authority proposals for

(a) environmental objectives for each river basin district, in accordance with regulation 13, and

(b) a programme of measures to be applied in order to achieve those objectives, in accordance with regulation 20. [emphasis added]

(2) In preparing proposals under paragraph (1), the appropriate agency must

(a) take account of the characterisation of, and economic analysis of water use in, the relevant river basin district carried out or updated under regulations 5 and 7, and

(b) take such steps as the appropriate agency thinks fit, or the appropriate authority may direct, to

(i) provide opportunities for the general public and those persons likely to be interested in or affected by the appropriate agency's proposals to participate in discussion and the exchange of information or views in relation to the preparation of those proposals,

(ii) publicise the appropriate agency's draft proposals to those persons, and

(iii) consult those persons in respect of those proposals.

...

(6) The appropriate authority must ensure that, for each river basin district, the environmental objectives and programme of measures are periodically reviewed and, where appropriate, updated

(a) by 22nd December 2021, and

(b) subsequently, by 22nd December of the sixth year following that date and of each sixth year following that.” [emphasis added]

Note that the 2021 deadline was extended by 12 months by reason of the Covid pandemic.

31. Reg 13(1) and (2):

“The environmental objectives

13(1) The environmental objectives referred to in regulation 12 are, subject to regulations 14 to 19, the following objectives for the relevant type of water body or area.

(2) For surface water bodies, the objectives are to—

(a) prevent deterioration of the status of each body of surface water;

(b) protect, enhance and restore each body of surface water (other than an artificial or heavily modified water body) with the aim of achieving good ecological status and (subject to paragraph (3)) good surface water chemical status, if not already achieved, by 22nd December 2021;

(c) protect and enhance each artificial or heavily modified water body with the aim of achieving good ecological potential and (subject to paragraph (3)) good surface water chemical status, if not already achieved, by 22nd December 2021;

(d) aim progressively to reduce pollution from priority substances and aim to cease or phase out emissions, discharges and losses of priority hazardous substances.”

32. Reg 15 allows the EA to designate a body of water as being heavily modified, thus becoming a “HMWB”.
33. Reg 16(1) and (6):

“Extended deadlines for environmental objectives

16(1) The deadline by which an environmental objective referred to in regulation 13(2)(b) or (c), (5)(c) or (6) must be achieved may be extended for the purposes of the phased achievement of the environmental objectives for a body of water if the conditions in paragraphs (2) and (3) are or will be met.

...

(6) Where a deadline is extended under paragraph (1), the relevant river basin management plan must set out

(a) the extended deadline and the reasons for it,

(b) a summary of the measures to be applied to achieve the environmental objectives set pursuant to regulation 12 which are envisaged as necessary to bring the body of water progressively to the required status by the extended deadline, and

(c) the reasons for any significant delay in making these measures operational and the expected timetable for their implementation.”

34. Reg 16(7):

“(7) Following an extension under paragraph (1), the next update of the relevant river basin management plan must include a review of the implementation of the measures referred to in paragraph (6)(b) and a summary of any additional measures necessary for the purpose set out in that paragraph.”

35. Reg 20(1):

“Content of programmes of measures

20(1) Each programme of measures proposed and approved under regulation 12 must include basic measures and, where necessary, supplementary measures (see paragraph (4)).”

36. Reg 20(2)(g):

“20(2) The basic measures must comply with Article 11.3 of the WFD and must, in particular include the following – [...]

...

(g) for point source discharges liable to cause pollution, a requirement for prior regulation or prior authorisation which sets emission controls for the pollutants concerned;”

37. Reg 25:

“Action where environmental objectives are unlikely to be achieved

Where monitoring or other data indicate that the environmental objectives set for a body of water under regulation 12 are unlikely to be achieved, the appropriate agency or, where relevant, the appropriate authority must ensure that –

(a) the causes of the possible failure are investigated,

(b) relevant permits and authorisations are examined and reviewed as appropriate,

(c) the monitoring programmes under regulation 11 are reviewed and adjusted as appropriate, and

(d) such additional measures as may be necessary to achieve those objectives (subject to the application of regulations 15 to 19) are included in the programme of measures applying to that body of water.”

38. Reg 29(1) and (2):

“River basin management plans: public participation

(1) The appropriate agency must –

(a) not less than three years before the relevant date, publish a statement of –

(i) the steps and consultation measures the appropriate agency is to take in connection with the preparation of the updated plan, and

(ii) *the dates by which those steps and measures are to be taken;*

(b) *not less than two years before the relevant date, publish a summary of the significant water management matters which the appropriate agency considers arise for consideration in relation to the river basin district;*

(c) *not less than one year before the relevant date, publish a draft of the updated plan.*

(2) *The appropriate agency must carry out the publication required by paragraph (1) in such manner as the appropriate agency considers appropriate for the purpose of bringing it to the attention of persons likely to be affected, and must –*

(a) *make copies of the statement, summary or draft updated plan accessible to the public free of charge through its website and at its principal office;*

(b) *publish a notice –*

(i) *stating the fact of publication,*

(ii) *specifying the arrangements made for making copies of the statement, summary or draft updated plan available for public inspection, and*

(iii) *stating that any person may make representations to the appropriate agency in relation to the statement, summary or draft updated plan;*

(c) *consult the persons referred to in paragraph (4);*

(d) *take such steps as the appropriate agency thinks fit, or the appropriate agency may direct, to provide opportunities for the general public and the persons referred to in paragraph (4) to participate in discussion and the exchange of information or views in relation to the preparation of the draft updated plan;*

(e) *invite the public and the persons referred to in paragraph*

(4) to make representations in relation to the draft updated plan.”

39. Reg 32:

“Supplementary plans

32(1) The appropriate agency may prepare a supplementary plan for the purposes of supplementing the river basin management plan for a river basin district.

(2) A plan prepared under paragraph (1) may, for example, relate to—

(a) a particular description of body of water;

(b) a particular catchment or geographical area;

(c) a particular matter relating to, or aspect of, the water environment;

(d) a particular description of user of water resources.

(3) The appropriate agency must, in relation to the preparation of a supplementary plan, consult such of the persons referred to in regulation 29(4) and such other persons likely to be interested in or affected by that plan as the appropriate agency thinks fit, and must take into account any views expressed by those consulted.”

40. Dr Wolfe relies on two decisions of the Court of Justice of the European Union (“CJEU”), firstly, *Umwelt v Germany* (C461/13). That case concerned the application for the authorisation of a specific project on the River Weser in the Grand Chamber of the CJEU and in particular [48]:

“Consequently, those projects are covered by the obligation, laid down in Article 4 of Directive 2000/60, to prevent deterioration of the status of bodies of water. However, the projects may be authorised pursuant to the system of derogations provided for in Article 4.”

41. Ms Pindham refers to [50]:

“It follows that, unless a derogation is granted, any deterioration of the status of a body of water must be prevented, irrespective of the longer term planning provided for by management plans and programmes of measures. The obligation to prevent deterioration of the status of bodies of surface water remains binding at each stage of implementation of Directive 2000/60 and is applicable to every surface water body type and status for which a management plan has or should have been adopted. The Member State concerned is consequently required to refuse authorisation for a project where it is such as to result in

deterioration of the status of the body of water concerned or to jeopardise the attainment of good surface water status, unless the view is taken that the project is covered by a derogation under Article 4(7) of the directive.”

42. There are two paragraphs of the Advocate-General’s Opinion which have some relevance:

“4. First, even though the WFD sought to establish a fundamental common basis to coordinate the patchwork of Community and national legislation in force, the fact remains that the WFD is a complex and particularly elaborate measure which is unusually difficult to understand. In particular, many difficulties are raised by the legislative drafting technique of making numerous references from one provision to another and to other measures and of laying down several derogations the scope of which cannot be clearly identified. In that regard, it is symptomatic that the water management system stemming from the WFD has led to the adoption of a great number of explanatory measures, to the creation of specialised databases and to water research in the context of the European Union’s Seventh Research Framework Programme.

5. Secondly, in conjunction with the abovementioned difficulties, the present case reveals a confrontation between two entirely opposed visions of the WFD. The first approach could be classified as minimalist since the WFD would be reduced to a tool for large-scale water management planning. By contrast, under the second approach, with which I concur, the WFD represents a new methodology for water management covering not only the level of planning but also the level of implementation of the binding environmental objectives, which results in the adoption of specific measures to ensure good water status and avoid a deterioration of water status. Therefore, the answer to the questions referred requires an in-depth analysis of the purely technical, or even scientific, terms, methods and parameters that form the basis of the system enabling water status to be identified.”

43. Dr Wolfe submits that this case shows the focus of the WFD on the individual water body and that the Programme of Measures can, and indeed should, include water body specific measures. Ms Pindham, referring to [50], says that the WFD draws a clear distinction between the water body impacts and the river basin planning process.

44. I agree with Mr Fraser that the case is of little assistance. The issues in the case did not relate to the interaction between the Article dealing with the River Basin planning process and the obligations in the Programme of Measures in respect of specific water bodies. Therefore the paragraphs he relies on are in a different forensic context, and in my view cast no light on the issue that I have to decide.
45. He also relies on *Commission v Spain I* [C-559/19].
46. The European Commission brought an action against Spain alleging, inter alia, a failure to “draw up appropriate basic and supplementary measures” for inclusion in the two plans. That complaint is addressed at [112]-[141]. The CJEU began by noting that the Programmes of Measures “constitute the basic planning instruments for responding to the identified pressures on the bodies of water concerned and for achieving good water status in the river basins or bodies of water” [126]. The CJEU rejected the Commission’s primary concerns about individual measures at [128]-[130]:

“128 In the present case, the Commission contests, in the first place, a series of individual measures established by the Kingdom of Spain, However, the Commission has not adduced any evidence to show that the contested measures are not appropriate for achieving ‘good quantitative status’ of the bodies of groundwater concerned, for the purposes of Article 4(1)(b) of Directive 2000/60.

129 Nor does the Commission explain the reasons why the Kingdom of Spain infringed Article 11(3)(a), (c) and (e) and (4) of Directive 2000/60 by adopting the contested measures or the reasons why such measures are alleged to be insufficient in the light of that provision. The Commission merely contests the fact that the measures established are intended essentially to address the problem of illegal water abstraction, that the 2014 Special Irrigation Plan for Doñana attaches excessive importance to water transfers, that the resources allocated are not sufficient, and the lack of transparency on the part of the Spanish authorities concerning the inspection and closure of illegal wells and the

problem of excessive water use as a result of tourism. However, it neither explains nor demonstrates why those contested actions or measures are contrary to or insufficient under Article 11(3)(a), (c) and (e) and (4) of Directive 2000/60.

130 Finally, the Commission maintains that the Kingdom of Spain has failed to apply and implement a series of measures. However, as that Member State has demonstrated, both in writing and at the hearing, measures have been established and implemented, in particular control and inspection measures. In that regard, it is apparent from the file submitted to the Court, more specifically from the annexes to the defence and rejoinder, that that Member State established a series of control and inspection measures, including penalties, with a view to halting illegal water abstraction.”

47. All of these measures discussed appear to be national, river or sub-river basin level, rather than specifically water body level. The CJEU went on to hold that the “*Programme of Measures*” must also “*have as its object the adoption of the measures necessary to avoid any deterioration of the protected areas covered by Directive 92/43*” [134]. The CJEU concluded that the Programme of Measures “*does not contain any measures to halt the already established deterioration of protected habitat types in the protected area in the vicinity of Matalascanas [a tourist centre in the region]*” [139].
48. Although this case did concern the lawfulness of the Programme of Measures, the question of whether such a Programme had to be directed at the specific water body was not before the CJEU. Therefore the judgment is of limited assistance in the case here.

Statutory Guidance

49. The SoS produced statutory guidance under regulation 36(5) entitled, “River basin planning guidance” in September 2021. Dr Wolfe places considerable reliance on this document in supporting his case.

50. The most relevant parts of the Guidance are as follows:

- a. Para 5.2, particularly the last bullet point:
 - i. Iteration is built into the river basin planning process. It is necessary to
 - Identify objectives for water bodies and protected areas including the pressures and risks
 - consider possible measures to meet those objectives given current pressures on the water environment as well as risks from emerging challenges such as climate and population change
 - consider the technical feasibility, costs and benefits of implementing those measures
 - in the light of this, to reassess the objectives and consider the use of the alternative objectives to determine the measures that will be implemented in the period covered by the plan.
- b. Section 8 deals with the purposes of the RBMPs. It is noteworthy that at para 8.1 there is reference to the Plans being “understandable at catchment, river basin district and wider area”. This seems to suggest that the Plans can themselves be a high level.
- c. Para 8.7-8.9 states:

"8.7. The main purpose of the consultation is to bring about transparency and facilitate public engagement in the river basin planning process. To help achieve this, the consultation should include workings and explanations of the reasons for the proposed planning cycle objectives, including the considerations which have informed proposals for the use of the alternative objectives. This should help those likely to be affected to understand the reasoning behind the proposed changes.

8.8. The consultation should propose environmental objectives for each water body in the river basin district and programmes of measures to achieve those objectives. The consultation should also provide an estimate of the scale of actions and improvements that might be delivered. This estimate should be based on an assumed level of available national funding related to the most directly

relevant programmes and an assumed level of additional voluntary action through local efforts.

8.9. The consultation on the draft updated plans should include:

- an assessment of the costs and benefits of the proposed programmes of measures
- the information listed in paragraph 14.23"

d. Section 9 deals with the use of standards in river basin planning. Paras 9.1-2 state:

“9.1. The WFD regulations require the Environment Agency to set environmental objectives and establish programmes of measures for each body of water in England.

9.2. These measures and objectives must be reviewed and updated every 6 years as part of the river basin planning process. For water bodies to reach their objectives, they must meet a large number of standards for things such as pollutant concentrations, health of fish populations, and groundwater quantity. Different objectives and standards will apply to different water bodies. Surface water, groundwater and water bodies used for abstracting drinking water have different sets of criteria. The precise values for standards have been set with advice from the UK Technical Advisory Group (“UKTAG”).”

e. Section 10 covers the “water body objectives” and this refers at para 10.3 to the EA setting objectives for each water body in relation to preventing deterioration and achieving a particular status.

f. Para 10.6 states:

“The Environment Agency will be more certain of meeting some objectives than others because of variations in the level of confidence that applies to the classification of a given water body and certainty about the effectiveness of proposed measures.”

g. Section 14 deals with the programmes of measures. Paras 14.1-2 state:

“14.1. The WFD regulations refer to both actions and the delivery mechanisms as ‘measures’. However, in this guidance the terms are used as follows:

- ‘measure’ is used to mean any action which will be taken on the ground to help achieve the objectives
- ‘mechanism’ is used to mean the policy, legal and financial tools which are used to bring about those actions. Mechanisms include, for example: legislation, economic instruments (which can include taxes, tradable permits and payments for ecosystem services); codes of good practice; negotiated agreements; promotion of water efficiency; educational projects; research; development and demonstration projects

14.2. The Environment Agency is responsible for combining the available measures together to form a programme of measures to achieve the objectives in each river basin district. They must therefore consider both the measures which will be necessary and the mechanisms by which they will be delivered.”

h. Para 14.3-4 states:

“Scope of the programmes of measures: Environmental objectives only

14.3. A programme of measures must include all of the measures necessary to meet all the objectives for that river basin district, including the protected area objectives and measures with the aim of progressively reducing pollution from priority substances and ceasing or phasing out emissions, discharges and losses of priority hazardous substances. It should not include measures which are required solely to meet other, non-water quality objectives (for example the Environment Agency’s corporate plan targets).

14.4. Where measures contribute towards both water quality objectives and other objectives, they should be included in the programme of measures to the extent that they are required to achieve the environmental objectives, as defined in the WFD regulations. This definition of the scope of a programme of measures is intended to help clarify what the Environment Agency should submit to the Secretary of State for approval. It is intended to encourage integration and streamlining between the river basin planning process and other planning processes such as flood risk management plan and plans for delivering biodiversity outcomes.”

i. Para 14.19 states:

“For reporting purposes, the complete picture of all of the measures necessary to achieve the objectives in a river basin district and all of the mechanisms necessary to deliver them will be set out in a large portfolio of technical, legal and administrative documents (which cover different geographical scales, contain different levels of detail, are owned by different bodies and operate over different timescales). While all of this information may be essential for the implementation of measures, it does not need to be submitted to the Secretary of State.”

51. The Guidance is strongly supportive of the Claimant’s case. There is a direct correlation between the environmental objectives covered in Section 10 and the Programme of Measures covered in Section 14. The paragraphs set out above show, in my view, quite clearly that the Programme of Measures must include measures to meet all the environmental objectives, and this will necessarily include measures which are water body specific.

The Factual Context

52. The process undertaken by the EA to achieve compliance with the WFD and the Regulations is described in witness statements from Mr Mark Scott, a senior advisor on river basin planning with the EA. There is a complex interaction between the planning process and the timescales under the WFD and the Regulations for achieving good ecological status. In essence, the deadline for such status can be extended beyond 2015 provided that the conditions set out in regulation 16 are met, namely reasons of technical feasibility, disproportionate expense or natural conditions.
53. The majority of surface water bodies both in England as a whole and in the HRBD have had the deadline for achieving good ecological status, or good ecological potential, extended beyond 2021. In 99% of those cases the reason given has been “*disproportionately expensive: disproportionate burdens*”.

54. The WFD and the Regulations require the EA to prepare RBMPs. The first suite of plans were approved in 2009. The second suite was updated in 2015 and approved in 2016. The third (and current) suite were reviewed, updated and approved in December 2022 (there was a year's delay due to the Covid pandemic).
55. Mr Scott sets out the history of river basin planning after the implementation of the WFD. He refers to an agreement between EU member states and the EU Commission on a Common Implementation Strategy ("CIS") which produced a number of guidance documents. He then refers to some of these guidance documents to make the point that they refer to the management plans being "*strategic*" documents and being in "*broad terms*", see CIS Guidance Document 11.
56. Similarly, in the Reporting Guidance 2016 there is reference to the difference between water body level and the summary Programme of Measures:

"The WFD Reporting Guidance 2016 notes that reporting should be based on the obligations of the WFD. The guidance makes clear the difference between the information expected to be presented and reported at water body scale and the summary nature of the programmes of measures:

- *Water body level*

The water body is the assessment level of the WFD. It is the basic physical unit of the Directive to which characterisation, pressures, impacts, objectives, monitoring and assessments are attached. It is, therefore, the main reporting unit for these components of WFD implementation.

- *River Basin District or Sub-unit level*

Methodologies and approaches are usually developed at (the national part of) RBD or national level, hence this is the appropriate level for reporting. In addition, measures are reported at (the national part of) RBD or sub-unit level, in accordance with the WFD's requirements to include a summary of the programme of measures in the RBMPs.

Reporting of measures at water body level would be disproportionate and not useful at EU level.

(A footnote on the same page in the guidance defines a sub-unit as an intermediate reporting scale between water bodies and RBDs for cases where RBDs are very large)."

57. Critically in the context of this case, Mr Scott draws a distinction between the planning process and the delivery of the environmental objectives. At para 29 of his second witness statement he says:

"The WFD Regulations 2017 and RBMPs, in and of themselves, do not enable the delivery of any actions to achieve the environmental objectives in the RBMP. Implementation of the programmes of measures happens through the exercise of regulatory functions (duties and powers) and application of policies on the ground, in order to enable the Environment Agency to fulfil its duty to secure compliance with the requirements of the WFD. The Environment Agency exercises functions contained in the Acts and Statutory Instruments listed in Parts 1 and 2 respectively of Schedule 2 to the WFD Regulations 2017. These Acts and Statutory Instruments also form part of the Summary Programmes of Measures)."

58. Mr Scott explains that the RBMP comprises a set of individual documents and online systems which the EA describes as being in the following form:

- (1) Introduction;
- (2) Implementing the plans;
- (3) Current condition and environmental objectives;
- (4) Challenges for the water environment;
- (5) Summary Programmes of Measures;
- (6) RBD data explorer;
- (7) RBD map explorer;
- (8) River basin planning process overview;
- (9) Progress report.

59. The summary Programme of Measures itself comprises a series of documents:
- (1) River basin management plans, updated 2022: summary Programmes of Measures;
 - (2) Summary Programmes of Measures – mechanisms;
 - (3) Individual spreadsheets containing a summary of measures for Humber River Basin District;
 - (4) A spreadsheet of potential additional Programmes of Measures;
 - (5) River Basin planning: local measures case studies.
60. Critical to the Claimant’s case is the lack of water body specific “measures” in any of these documents which relate specifically to the UCB. It would make this judgment disproportionately long and close to unreadable if it were to set out detail from the documents listed above. However, it is not in dispute that there are no measures in those documents which are UCB specific.
61. The summary Programme of Measures states at Section 2:
- “This section describes how the summary programmes of measures were developed.*
- The development of measures is an integral part of the catchment planning processes. Section 2.4 of the river basin planning process overview outlines the stages in this process. It involves assessing compliance with local water body objectives, investigating any reason for failure, and developing local actions to resolve those failures. Much of this is done in collaboration with partners (for example catchment partnerships).”*
62. Section 4 sets out “Programmes of Measures for each sector” and commences with the Water Industry. However, the measures are entirely generic and not site or water body specific.

63. Section 5 sets out “*Topic Action Plans*” covering, for example, chalk streams and again the actions are generic.
64. There is a separate document headed “*summary Programme of Measures – mechanisms*”. This sets out the legal powers and mechanisms, for example through the licensing regime, which are open to the EA.
65. The Catchment Data Explorer ‘CDE’ presents data for, and comprises part of, the river basin management plans. This does have a webpage which relates to the UCB and has classifications for the UCB but does not have any measures to meet the relevant objectives. The nature of the classifications for a HMWB are complex, at least in part because of the difficulties in achieving certain ecological standards in a water body significantly affected by human activity. Ultimately, so far as I can see, these complexities do not matter for the issues in this case. The document records that the overall Ecological categorisation of the UCB is Moderate, and the categorisation for “*mitigation measures assessment*” is Moderate or less.
66. The EA’s witness, Mr Scott, explains in his witness statement how these classifications and standards relate to a HMWB and the UCB in particular. The precise details of how this is applied and arrived at do not impact on the case. It is however relevant that the classification for the UCB is not Good and therefore the target that is set by the WFD and the Regulations to be achieved by 2027 is not currently met. That is not in dispute.
67. The Catchment Data Explorer has a further page, which is headed “*Investigations into Classification Status.... Reasons for Not Achieving Good (“RNAG”)...*”. This is UCB specific, but only in terms of characteristics, not measures to be adopted. It refers to a number of Point Sources, one being the activity of Trade/Industry, which

itself then links to another page setting out the activity, including the two fish farms and the Water Treatment Works referred to above. In each case, and on every link the “measure” box states “N/A”, i.e. not applicable.

68. On the RNAG page there is a table headed “*Objectives*”, which included the “status” and the “reasons”. The reasons in respect of Ecological and Biological quality elements state:

“Disproportionately expensive: Disproportionate burdens; Good status prevented by A/HMWB designated use: Action to get biological element to good would have significant adverse impact on use”.

69. It can therefore be seen from these documents, which together form the HRBMP that there are no measures specific to the UCB.
70. The EA does produce a document, in a web based spreadsheet, which is described as the Catchment Planning System. This document is not part of the HRBMP, nor of the Programme of Measures which is subject to consultation. It is important however in showing the level of detailed consideration of actions on a water body specific level, which the EA does and is capable of carrying out.
71. There is a spreadsheet which relates specifically to the UCB. It is headed “*Actions to review October 2022*”. Two lines in this spreadsheet are relevant:

“Review and enforce applicable permits – tbc [to be confirmed]

Costa Beck investigations – To understand the links between the operation of discharges from Pickering STW, the formation of organic rich sediments, the resuspension of sediment / organic material under different flow conditions, the effect of sediment oxygen demand on dissolved oxygen in the water column and, compliance with WFD standards throughout Costa Beck. Identify any assets needing improvement. This investigation should include monitoring of dissolved

oxygen conditions in the mixing zone of Pickering discharge in both dry and storm conditions.”

72. The EA commenced a 6 month consultation on the draft HRBMP on 22 October 2021. On 22 April 2022 the Claimant submitted its response, stating that no up to date Catchment Planning System list of measures had been produced for the UCB, or any water body. It pointed to regulatory measures that the EA could take.
73. The Claimant sent its first pre-action protocol (“PAP”) letter on 22 February 2022. The PAP letters are long and complex, and the arguments on both sides somewhat shift. However, at the heart of all three of the Claimant’s PAP letters is both reference to the requirement to set out specific measures for individual water bodies, and the alleged failure to consult on specific measures to achieve the objectives for the UCB.
74. The content of the PAP responses are relevant because it appears that the EA changed its position. In its response dated 15 March 2022 the EA said:

“1. The Claimant is wrong in its assertion that the Agency has acted unlawfully in its application of the WFD/WFD Regs. There has been a review of the programme of measures for all water bodies in general and Costa Beck in particular as is required by regulation 12(6) WFD Regs. The Agency is fully aware of the need to undertake such a review and has not misdirected itself. The wording of our letter dated 18 January 2022 was not accurate in that respect and thus your assumption in paragraph 32 of your pre-action letter is not correct.”

75. At paragraph 41 of that letter the EA referred the Claimant to the Catchment Data Explorer, which contained information about individual water bodies, albeit not measures to achieve the objectives.
76. However, the Claimant then sent a further PAP letter. On 18 May 2022 the EA responded that the regulation 12(6) duty applies in relation to each river basin district “as a whole”, which can only mean that it does not apply at the water body specific

level. They said there was no duty to consult on specific measures which might only apply to a single water body, such as the UCB.

77. The final version of the HRBMP, together with all the other RBMPs, was submitted to the SoS for approval on 28 November 2022. The Ministerial Submission has some relevance to the case. As most relevant it states:

“9. The updated RBMPs comprise a number of documents and sub-documents, datasets and an online mapping tool (Catchment Data Explorer). These provide different information for different audiences, from headline information about the pressures on the water environment for the ordinary reader, through to specialised content on what measures need to be taken to improve individual water bodies. These documents are available to the viewer on gov.uk. More information is in the attached Annex B. The proposed plans follow the priorities set out in the Ministerial Guidance to the EA, approved by Minister Pow and published in 2021.

...

11. These RBMPs comprise the final planning cycle envisaged under the Water Framework Directive in which the deadline for achieving good ecological status can be extended (i.e. to the end of 2027). They set out the latest evidence on the state of the water environment together with the programmes of measures which show how we aim to achieve good ecological status by the end of 2027. They will note that (as is widely known) we have only low confidence that this target can be met by the deadline.

...

15. Given the reference to these mitigating measures, we recommend approval of the RBMPs as they are the best product that EA can produce at this stage; both aiming to remain compliant with the underlying legislation and recognising the gap in progress towards 2027.”
[emphasis added]

78. Ministerial approval for the updated RBMPs was confirmed on 14 December 2022 and statutory notification published on 23 December 2022.

The Upper Costa Beck

79. The UCB is a ground water fed stream rising just west of Pickering, Yorkshire. It is located within the catchment area of the River Derwent, within the Humber River basin district. The UCB provides water to two fish farms and downstream is Pickering Water Treatment Works (“Pickering STW”) run by Yorkshire Water Limited, which discharges into the UCB. Discharges from the fish farms and Pickering STW are governed by environmental permits issued and regulated by the EA.
80. The UCB has been classified by the EA as a HMWB within the meaning of regulation 15 and Article 4(3). These are surface water bodies which as a result of human activity are substantially changed and therefore cannot meet the natural water body objective of good ecological status. The technical detail of this is irrelevant for the legal issues in this case. However, it is important to note that for a HMWB the aim is to achieve “*good ecological potential*” rather than “*good ecological status*”.
81. The UCB is currently classified as having “*moderate ecological potential*”.
82. From as early as 2006, the Claimant has raised concerns with the EA regarding the causes of the deterioration in the water quality of the UCB. That included concerns regarding (i) the impact of the recorded sewage overflows (spills) from Pickering STW; (ii) the level of sediment deposits resulting from the fish farm ‘suspended solids’ emissions; and (iii) the adequacy of the EA’s environmental permit conditions and other controls.
83. Mr Scott explains the specific position in respect of the UCB. In order to understand the thrust of the Claimant’s case and the approach the EA, and the SoS, take to individual water bodies, it is useful to consider the specifics of the UCB.

84. The EA has undertaken some regulatory activity in the UCB. Discharge permits have been issued to two fish farms, the Pickering WTW and to Flamingo Land Amusement Park. Abstraction licences have also been granted. Various pollution prevention visits have been undertaken to dairy farms in the catchment area.
85. Mr Scott refers to aspects of the HRBMP summary Programme of Measures relating to permitting, licensing and enforcement powers of the EA, which could deliver site specific actions on the UCB. These are all entirely general and non site specific.
86. He says that if and when river basin planning work identifies that specific on the ground regulatory action is required to meet the environmental objectives for the UCB, actions will be implemented. It is not very easy to understand how this relates to the continuing failures to achieve the environmental objectives in the UCB and in the light of the known discharges along the UCB.
87. The EA collects data on RNAG for the UCB. Again, the detail is not relevant for the outcome of this case. However, in relation to the fish element, the HRBMP RNAG data contains 11 RNAGs associated with fish, including physical modifications, sediment and dissolved oxygen. These directly relate to the reasons why the UCB is not achieving good (or at least better) ecological status. There does appear to be therefore a very direct link between the acknowledged reasons why the UCB is not achieving the status which would be required and the various activities on the UCB which are regulated (through various legal mechanisms) by the EA.
88. The RNAG data includes three new pieces of information linked to the fish element. These include the addition of commercial fisheries and the impact of intermittent sewage discharges as a suspected source of dissolved oxygen, which may be affecting the fish.

89. The target date is the date by which the future status is predicted to be achieved. As Mr Scott explains:

“The target date is the year by which the future status is predicted to be achieved. The date is determined by considering when the measures needed to achieve the planned status were, or will be, in place and, once implemented, the time taken for ecology or the groundwater to recover. The target dates generally reflect the 6-yearly dates associated with the review and update of the river basin management plans i.e. 2015, 2021, 2027.”

90. In general, the target date can only be extended beyond 2027 in specific and limited circumstances. Mr Scott explains that there are some objectives which the EA is more confident about meeting than others. Government guidance says that the EA should be clear about the confidence about the objectives they are setting:

“In line with this guidance, an indication of the level of confidence associated with the objectives being set was introduced for the first time in the 2022 river basin management plans. Therefore, the objectives set for 2027 are expressed in two ways in the RBMP:

- *‘good by 2027’ where there is confidence that the target status will be met by 2027, based on a reasonable expectation that all the necessary measures will be in place*
- *‘good by 2027 (low confidence)’ where there is still uncertainty about whether all the necessary measures will be in place to achieve target status by 2027”*

91. In the 2022 HRBMP UCB has been set an overall ecological potential of “*good by 2027 (low confidence)*.” The period has been extended to 2027 on the grounds of disproportionate expense. The objective in respect of fish was updated from “*good by 2027*” to “*moderate by 2021*”. This is allowed because UCB is a HMWB and therefore the fish cannot be expected to reach good. The best possible status or ecological potential must still be achieved, as required by regulation 17(3).

The submissions

92. Dr Wolfe's overarching submission, as set out in Ground One, is that the SoS has misdirected herself on regulation 12, in considering that the Programme of Measures does not have to relate specifically to an individual water body. The approach of the SoS is that the Programme of Measures can be wholly generic, whether at a national or river basin level, and the measures referred to therein do not need to relate to particular water bodies and the steps to achieve the environmental objectives for those specific water bodies.
93. He submits that the Programme of Measures can, if appropriate, be at a generic level, but they have to be shown to be applicable at a water body level in order to secure the environmental objectives. Each of the Grounds relies on this same central proposition, even though they focus on different parts of the Regulations.
94. Ground One is that the SoS has approved the HRBMP, and the updated Programme of Measures within it, on the basis of a misdirection of law; that reviews and updating of the Programme of Measures pursuant to regulation 12 (6) did not have to be done at a water body level and could be carried out only at the river basin district level. This Ground focuses on the regulation 12(6) duty to ensure periodic review and updating of the Programme of Measures.
95. Ground Two is essentially the same point put in a slightly different way and is not proceeded with as a separate Ground.
96. Ground Three is again very closely related. Dr Wolfe submits that the SoS has failed to approve (and the EA to submit) a lawful Programme of Measures under regulation

12 read with regulation 3 because the Programme of Measures that was submitted as part of the HRBMP was generic and did not include measures specific to the UCB.

97. Ground Four is that there is a breach of the regulation 16(7) duty to include in the RBMP a review of the “*implementation of the measures*” for achieving the relevant objectives. The national level Progress Report, upon which the SoS relies, is not conducted at a water body level and is thus in breach of the Regulations. Therefore again, this comes back to the same central issue of interpretation of the WFD and the Regulations.
98. Ground Five is that there was a failure to conduct a lawful consultation under regulation 29, and thus the SoS did not allow proper public participation in the making of the Plan. I deal with this separately in the final section of the judgment. As I understand it, this Ground relies on the central issue of construction of the Regulations because the alleged failure to consult is in respect of a failure to consult on measures to achieve the environmental objectives.
99. Dr Wolfe relies upon the structure and purpose of both the WFD and the Regulations. As I explain in more detail below in my conclusions, he submits that the scheme of the WFD and the Regulations makes it clear that Programmes of Measures and any review thereof, must be water body specific.
100. The environmental objectives in the WFD are directed to preserving and enhancing the status of each individual body of water, see article 4(1)(a) and regulation 13(1). The WFD scheme requires a Programme of Measures to be proposed, approved, reviewed and achieved on a 6 yearly cycle with the aim of achieving water body level environmental objectives, see Article 11 and regulation 12(1)(b) and 16(6)(b). It therefore follows that regulation 12(6) requires an assessment of adequacy of the

existing Programme of Measures, and any measures to achieve the objectives, to be water body specific. This is because the structure of the WFD and the Regulations is to establish a process by which the environmental objectives for each water body are met over a prescribed period of time. The statutory scheme must therefore require the setting out of the relevant measures at a water body specific level in order to meet the overall objectives and purpose of the WFD.

101. Dr Wolfe also relies upon the SoS's Guidance, in particular at paragraphs 5.2 and 9.1 and 9.2. He submits that those paragraphs of the Guidance, as set out above, make it clear that the measures have to be applicable at a water body specific level, and need to be described as such. Section 9 of the Guidance is dealing with the Programme of Measures, and the measures and objectives must themselves apply at the water body level. The Programme of Measures is in effect a "*gap analysis*" to address what steps need to be taken to achieve the objectives.
102. It is submitted that the Defendant's and Interested Party's characterisation of the Programme of Measures in the high level and generic way set out, robs it of any meaningful content in meeting the environmental objectives.
103. The SoS and the EA submit that the Claimant's interpretation would be administratively unworkable. Ms Pindham relies upon the statement of Mr Chandler, a senior official at DEFRA, and the many thousands of discharge permits and licences in place, quite apart from the large number of water bodies. She submits that to adopt the Claimant's interpretation would be unworkable or impracticable. She relies upon the words of Lord Millett in *R (Edison First Power Ltd) v SSEFRA* [2003] UKHL 20 at [116]:

“[t]he Courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless... The more unreasonable a result, the less likely it is that Parliament intended it [on this latter point referring to Lord Reid’s judgment in Wickham Machine Tool Sales Ltd v L Schuler AG [1974] AC 235 at page 251].”

104. On this point of practicability, Dr Wolfe responds that the CPS does contain a list of measures which are water body specific in relation to the UCB, and which for example include the action to *“review and enforce applicable permits”*. Therefore, in practice the EA does do at least some of this work. He submits that there is nothing inherently unreasonable in the EA being required to review each permit if that is what is necessary in order to achieve the environmental objectives for the UCB.
105. Ms Pindham submits that the Programme of Measures in regulation 2 is defined as being in relation to a river basin district, whereas the *“environmental objectives”* refer to water bodies and river basins. Therefore a distinction is drawn in the wording of the Regulations between the objectives which are water body specific, and the Programme of Measures which is at river basin level.
106. Where the Regulations relate to a *“body of water”* then they say so specifically. Therefore regulation 13 (environmental objectives) refers specifically to water bodies, whereas regulation 12, when dealing with the Programme of Measures, does not refer to water bodies. The Programme of Measures must be set to achieve the environmental objectives, but does not have to do so at the water body level.
107. Mr Chandler in his witness statement explains the high level nature of the RBMPs, and that they are not intended to be a plan for detailed management of individual water bodies. The RBMP is a strategic plan for the entire river basin. The difficulty with this argument is that although the main document is undoubtedly strategic, the

suite of documents that the EA produces and the SoS approves as part of the HRBMP, includes documents that do stoop to water body level, i.e. the CDE and the RNAG analysis. What is not included is the setting out of measures to achieve the environmental objectives at a water body level.

108. There is perhaps an element of confusion in Mr Chandler's witness statement. He focuses on whether the RBMP itself needs to include a Programme of Measures which is water body specific. However, Dr Wolfe made clear that his case is not that the RBMP itself must be water body specific, but rather that there must be measures set out in accordance with the Directive and the Regulations which explain how the environmental objectives will be met, and this needs to be at a water body level.
109. Ms Pindham relies on regulation 20 which does not expressly require a Programme of Measures in respect of each and every water body within a river basin, and makes no reference to individual water bodies. Therefore a Programme of Measures may apply to more than one water body, which indicates that it does not have to contain specific measures in respect of individual water bodies.
110. Ms Pindham submits that the environmental and regulatory objectives can be effective at a national level, for example by setting out investment across England. The only requirement under regulation 12 is that the environmental objectives and the Programme of Measures are reviewed within the appropriate period. The Regulations do not set out any requirement as to the level of specificity required. In relation to the duty under Article 11(5) WFD she submits that can be met entirely at a national level.
111. The issue of how to achieve the environmental objectives is well known and understood by the EA, and the EA produced the Catchment Data Explorer which sets out the RNAG (see above), which is part of the RBMP.

112. The Programme of Measures could include water body specific measures, but there is no legal obligation that it should do so. The Programme of Measures has to be designed to achieve the environmental objectives, but not to refer to the individual water bodies. She submitted that the Programme of Measures in the HRBMP is sufficient to give the SoS a reasonable expectation that the environmental objectives will be met. Ms Pindham referred to the Overview document which at para 3.4.2 has a heading of “*managing risk*” and refers to using risk information. Ms Pindham suggested this was sufficient for the SoS to achieve the requisite level of confidence that the environmental objectives would be met, and therefore (as I understand the argument) that Article 11(5) duties are not triggered. However, she accepted that there was no evidence that the Programme of Measures could reasonably be expected to achieve the objectives.
113. In my view there is a considerable element of smoke and mirrors here. The risk commentary in the Overview is entirely generic. The Ministerial Submission at paragraph 11, on the level of confidence in achieving objectives, is plainly on the national level. However, the RNAG for the UCB, makes it clear that the environmental objectives for the UCB are unlikely to be met. It therefore appears on the evidence in respect of the UCB, that Article 11(5) is met and additional measures are required.
114. On Ground Three Ms Pindham further submits that regulation 12(1)(b) does not apply to updates of the RBMPs.
115. On Ground Four Ms Pindham submits that in respect of the review duty under regulation 16(7) there is no water body by water body assessment and it would have been disproportionate to do one for each water body.

116. I will deal with Ground Five discretely below in the Conclusions section, because it raises discrete points.
117. Mr Fraser on behalf of the EA relies heavily on the distinction between the Programme of Measures, which does not need to include individualised measures at the water body level, and the way in which the Programme of Measures is implemented or made operational, which inevitably involves actions at an individual water body level.
118. He refers to Mr Scott's evidence that the achievement of the environmental objectives in the RBMPs rely on thousands of individual actions, examples of which include monitoring water quality, inspections, issuing and reviewing permits and investigations. Critically that is different from the planning process, which includes the setting out of the summary Programme of Measures.
119. He relies upon Article 11(6) which provides that "*in implementing measures pursuant to paragraph 3, Member States shall take all appropriate steps not to increase pollution ...*". Similarly, in Article 4 it is stated that "*In making operational the Programme of Measures.... (a)..(i) Member states shall implement the necessary measures....*". Therefore he submits that there is a distinction in the WFD between the duty to draw up the Programme of Measures and any requirement to implement it.
120. In respect of the Regulations, he relies upon the discretion given to the EA in regulation 32 to prepare a "*supplementary plan for the purpose of supplementing the RBMP...*". He submits that this shows that if the EA wishes to descend to a "*more detailed programme and management plan*", for example to deal with a specific water body then this is a power but not a duty.

121. Mr Fraser also submits that it is important that Dr Wolfe has been unable to point to any examples in EU Member States where the Programme of Measures have descended to the level of the individual water body. Nor is there any caselaw or infraction proceedings which would support his interpretation.
122. Mr Fraser, relying on the evidence of Mark Scott, suggests that it would be unrealistic to expect the Programme of Measures to contain individualised measures for each of the 4,929 water bodies in England. The EA regulates 58,000 water discharge permits and 20,000 licences. In the case of the implementation of the Programme of Measures in the UCB specifically, the EA regulates multiple water discharge permits and abstraction licences, which itself involves complex compliance assessments, investigations and monitoring.
123. Similarly, there are multiple visits to individual farms within the relevant catchment to consider schemes to prevent the discharge of pollutants into water. The Programme of Measures indicates where measures applied across all river basin districts or are specific to the Humber. However, it does not, and does not need to, set out how those generic measures will achieve the objectives in each individual water body. All that matters is that the EA has measures in the Programme which would allow it to achieve the objectives.
124. Mr Fraser’s overarching submission on the scheme of the WFD and the Regulations is that the WFD operates at a strategic level and *“is informed by and in turn influences a dynamic network of wider environmental regulation and policy making”*.
125. On Ground Four, he accepts that regulation 12(6) must be read with regulation 12(1) and therefore the review in regulation 12(6) must be to create a Programme of Measures which is *“applied in order to achieve those environmental objectives...”*, in

regulation 12(1)(b). The central issue is whether the Programme of Measures in regulation 12(1)(b) must explain how generic measures will meet the objectives in respect of each water body. The EA's position is that this step is not necessary.

126. The regulation 16(7) duty is met by the review of progress in the Progress Report. It is lawful to deal with the achievement of objectives in a general way.

127. He points to regulation 20 and the very general duty to include basic and where necessary supplementary measures, but nothing more specific than that.

Conclusions

128. In my view Dr Wolfe's interpretation of the WFD and the Regulations is correct and the Programme of Measures must set out the measures which meet the requirements of the WFD/Regulations. There may be cases where the required measures are wholly generic, i.e. they apply across a range of water bodies, either across the country or the River Basin. There is nothing unlawful about the Programme of Measures referring to such generic measures. Equally the level of detail required in the Programme of Measures will vary, and the EA will have a discretion in that regard. The issue in this case is one of statutory interpretation, whether the Defendants erred in law in their interpretation of the Regulations in failing to appreciate that the Programme of Measures needs to have measures which relate to specific water bodies. Given that error of law the Defendants never got to the stage of exercising a discretion as to what water body specific measures were necessary in respect of the UCB. Once the correct legal analysis is applied there may be further dispute over what is required in the water body specific Programme of Measures, but that is not the issue before this Court.

129. The WFD/Regulations are not particularly clearly drafted, see the comments of the Advocate General in *Weser* at [5], but the scheme, in my analysis, is as follows.
130. The purpose of the WFD is to establish a framework for the protection of areas of water, which aims at enhanced protection and improvement, inter alia through specific measures for reductions of discharges, etc, see WFD Article 1(c).
131. A Programme of Measures is to be drawn up for HRBD with the aim of achieving good ecological potential and good surface water chemical status within 15 years, see Article 11. That Programme of Measures is in order to achieve the environmental objectives under Article 4 (see Article 11(1)).
132. The environmental objectives are submitted by the EA to the SoS initially under regulation 12(1) which states that they are “*environmental objectives for each river basin district in accordance with regulation 13*”: and the Programme of Measures is “*to be applied in order to achieve those objectives*”, see Reg 12(1). Therefore the WFD and the Regulations entirely align.
133. The environmental objectives, as set out in Reg 13(1) and (2) plainly relate to specific water bodies. This is apparent from the wording of regulation 13(2), and is accepted by the SoS and the EA.
134. Given that the environmental objectives are water body specific, and the Programme of Measures is created to achieve those objectives, it is counterintuitive to suggest that the measures in the Programme of Measures could be wholly generic and not focused on whether, when and how the environmental objectives designated for the individual water body would be met.

135. The content of the Programme of Measures is set out in Article 11 (and Reg 20). Article 11(3)(g) refers to a basic measure including for point source discharges (such as a water treatment works) a requirement for prior regulation, and that the controls should be periodically reviewed where necessary. It is not clear whether this is generic controls, or it is intended to mean that the Programme of Measures must make specific reference to discharges and review. However, I note that the HRBMP does make reference to the specific point source discharges in UCB. It seems logical that where Article 11(3)(g) refers to controls being “*where necessary*” updated, that is a reference to individual water bodies and discharges, otherwise this phrase does not make sense. Ultimately the decision as to whether an individual discharger needs to be more tightly controlled can only be made on a water body specific basis. Even if it might be argued that the review of discharges could be wholly generic, that cannot be correct where the fundamental purpose of the “*measures*” is to achieve compliance in respect of objectives which are water body specific.
136. The argument is strengthened further by Article 11(5). That states that where monitoring shows that objectives are unlikely to be achieved then the member state shall ensure that relevant permits and authorisations are reviewed and then additional “*measures*” as may be necessary to achieve the objectives are established. This must be water body specific in order to make sense. In Article 11(8) it states that the Programme of Measures shall be reviewed, and any new or revised “*measures established under an updated Programme shall be made operational within three years...*”. On the Defendant’s approach the “*measures*” referred to in Article 11(5) are different from the “*measures*” in Article 11(8), because those in Article 11(8) are necessarily included in the Programme of Measures.

137. As with all statutory documents, it is necessary to read the document as a whole, and with a view to its mischief. The submission that the water body specific measures in Article 11(5) are different from the measures in Article 11(8) fails to read the WFD as a whole.
138. The confusion in this case in part comes from the fact that under Article 13 and Annex VII the RBMP need only contain a “summary” of the Programme of Measures under Article 11, see Annex VII paragraph 7. Therefore it would be open in principle to the SoS not to include all the measures in the Programme of Measures within the RBMP. The River Basin is the administrative area created within the WFD, but that does not dictate how the measures are to be drawn up.
139. Dr Wolfe was careful to explain that it was not, and never had been, his case that the HRBMP had to contain the water body specific measures. Rather, he submitted what was essential was that the full Programme of Measures (with the water body specific measures) had to be produced, reviewed and updated under Regulation 12. It was the SoS who had made clear in correspondence that compliance with Regulation 12(6) was met by the production of the HRBMP.
140. Regulation 16(6)(b) also makes clear the linkage between the environmental objectives, which are water body specific, and the measures. That regulation refers to the measures “*which are envisaged as necessary to bring the body of water progressively to the required status by the extended deadline*”. Again, if the measures are generic and there is no way to refer them to specific water bodies in order to consider their effectiveness in reaching the deadline then this would appear to rob regulation 16(6)(b) of any effect.

141. Regulation 20(4) has similar effect making provision for each Programme of Measures to include supplementary measures with the aim of meeting the objectives.
142. This analysis is entirely supported by the statutory guidance document produced by the Secretary of State in September 2021. That states in terms at para 9.1 that there must be Programmes of Measures “*for each water body*”. Para 9.2 then relates the measures back to the objectives for each water body. The fact that the guidance is in such clear terms rather undermines the suggestion that it is administratively impossible for the Programme of Measures to be water body specific.
143. The Guidance is statutory guidance made under regulation 36(5) and it is appropriate that I should place weight upon it, albeit it post-dates both the WFD and the Regulations. It is in my view relevant to the question of whether the SoS and the EA thought when it was drafted that the Guidance was suggesting something that was impossible or impracticable.
144. In respect of Ms Pindham’s submission that it would be administratively impossible to produce a Programme of Measures for each water body, the evidence does not support this. The EA does produce the Catchment Planning System, web based document. This is water body specific and sets out various measures, including critically “review and enforce applicable permits” for the UCB. There may be future disagreements about the level of detail that the Programme of Measures needs to set out, and whether the measures are sufficient to achieve the environmental objectives by the set date, but that is not the issue in the present case.
145. It may also be the case that having to set out a Programme of Measures on a water body specific level involves additional resources. However, that is not a matter for the Court. The Court’s function is to interpret the statutory provisions.

146. My conclusion on the issue of statutory interpretation deals with Grounds One, Three and Four. However, the submissions on Ground Five, on the consultation duty, further reinforce my conclusions on the earlier Grounds.

Ground Five - consultation

147. This Ground relies, firstly, on the central issue of construction of the Regulations because the alleged failure to consult is in respect of a failure to consult on measures to achieve the environmental objectives.

148. There is an additional argument under Ground Five, that the EA failed to provide the updated Catchment Planning System (“CPS”) list of specific measures for the UCB until 8 December 2022 after the consultation on the HRBMP had closed. This was the closest document/webpage that the EA produced with a list of measures specifically for the UCB, but was not consulted upon, because it was not part of the HRBMP.

149. The failure to lawfully consult led to unfairness because the EA was proposing to downgrade the fish element for the UCB from Good by 2027 to Moderate by 2021 but without the proposed list of measures it was not possible for the Claimant to understand and intelligently respond to the proposals.

150. Article 14 WFD gives a public right to consultation on the RBMP, but also a right of access to background documents and information used for the development of the draft Plan. The equivalent provision in the Regulations is regulation 29. Dr Wolfe relies on the WFD, the Regulations, the Statutory Guidance and the common law rights to be consulted.

151. The Statutory Guidance states:

"8.7. The main purpose of the consultation is to bring about transparency and facilitate public engagement in the river basin planning process. To help achieve this, the consultation should include workings and explanations of the reasons for the proposed planning cycle objectives, including the considerations which have informed proposals for the use of the alternative objectives. This should help those likely to be affected to understand the reasoning behind the proposed changes.

8.8. The consultation should propose environmental objectives for each water body in the river basin district and programmes of measures to achieve those objectives. The consultation should also provide an estimate of the scale of actions and improvements that might be delivered. This estimate should be based on an assumed level of available national funding related to the most directly relevant programmes and an assumed level of additional voluntary action through local efforts.

8.9. The consultation on the draft updated plans should include:

- an assessment of the costs and benefits of the proposed programmes of measures*
- the information listed in paragraph 14.23" [emphasis added]*

152. The purpose of such public consultation and right of access to background documents is to allow active involvement and consultation. This aligns closely with the domestic law on consultation as set out in *R v Brent LBC ex p Gunning* [1985] 84 LGR 168 where the second reason is to permit intelligent consideration and response to the proposal.

153. The first part of this Ground merely repeats the earlier Grounds, that the consultation did not include the measures required by the Regulations. However, Dr Wolfe also submits that the EA failed to provide the 2022 CPS list of specific measure for the UCB until 8 December 2022, i.e. after the consultation of the HRBMP had closed.

154. He submits that the Statutory Guidance by stating that the consultation would provide the workings and explanations for the reasons for the proposals, gave a right to request the background documents. The CPS documents would fall into this category but were only provided after the consultation closed and thus prevented any intelligent consideration or response to the consultation, see the well-known principles in *R v Brent LBC ex p Gunning* [1985] 84 LGR 168 and the following caselaw.
155. Both Ms Pindham and Mr Fraser submit that the consultation was carried out lawfully. There was no duty to provide further information because it did not form part of the work on the HRBMP and therefore there was no breach of any duty.
156. By reason of my conclusions on Grounds 1-4 there was an error of law in the consultation because the Plan itself did not contain the legally required information.
157. However, if I am wrong on those conclusions, I do not consider that there was an independent breach of the duty to consult under Ground 5. If the SoS and the EA are correct on their primary submissions, then the CPS data does not form part of the background documentation for the HRBMP and therefore does not have to be disclosed as part of the workings and explanations for the consultation documentation. Therefore the Statutory Guidance would not apply to this material.
158. This conclusion, which follows from Ms Pindham and Mr Fraser's submissions, however strengthens my conclusions on the principal issue. The information which is most critical to meet the underlying purpose of the WFD, namely the only data which goes to how the environmental objectives are going to be met in the specific water bodies, is not information the public are entitled to see as part of the consultation process. That merely illustrates how far the SoS and the EA's approach departs from the plain intent of the WFD and the Regulations.